(23)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 394.

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

May It Please the Court:

The Petition of Mae Huffman respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

For convenience, Petitioner and Respondent will be referred to as Plaintiff and Defendant. The cause is a

civil action, brought in the District Court of the United States for the Western District of Missouri, to recover damages, alleged at $35,000, for personal injuries received by plaintiff in a fall, on the basement stairs of a dwelling owned by defendant in Kansas City, Missouri, alleged to have been caused by the negligence of the defendant.

Plaintiff is a citizen of the Western District of Missouri, and defendant, Home Owners' Loan Corporation, is incorporated by an Act of Congress, with "authority to sue and be sued in any court of competent jurisdiction, Federal or State" (12 U. S. C., Sec. 1463 (a)). Defendant's stock is wholly owned by the United States (12 U. S. C., Sec. 1463 (b)). The District Court had jurisdiction on the ground that the suit arose under a law of the United States (28 U. S. C., Sec. 41 (1)), the Government of the United States being "the owner of more than one-half" of defendant's capital stock (28 U. S. C., Sec. 42).

The matter involved is a decision of the Circuit Court of Appeals for the Eighth Circuit, which, as plaintiff contends, decides questions of Missouri law in conflict with the controlling Missouri decisions, and violates the rule of *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 608, and Rule 52 (a) of the Federal Rules of Civil Procedure, by disregarding, and in effect setting aside, findings of fact of the District Court, based upon substantial and abundant evidence.

Upon a trial in the District Court without a jury, the Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment for defendant and against the plaintiff. From the judgment so entered plaintiff appealed to the United States Circuit Court of Appeals for the Eighth Circuit

(R. 34). The Circuit Court of Appeals, in an opinion by Judge Woodrough, affirmed defendant's judgment and overruled a timely petition for rehearing filed by plaintiff. The case was originally tried by Judge Albert L. Reeves, sitting without a jury, and he rendered judgment for the plaintiff in the sum of $20,000 (*Huffman* v. *HOLC*, 39 Fed. Supp. 139). Upon appeal therefrom the United States Circuit Court of Appeals for the Eighth Circuit reversed and remanded the case for a new trial (*HOLC* v. *Huffman*, 124 F. 2d 684), the opinion being written by Judge Gardner. The plaintiff then procured an order from Judge Reeves dismissing the case without prejudice, and the defendant appealed therefrom and the Court of Appeals reversed Judge Reeves's order and remanded the case for further proceeding (*HOLC* v. *Huffman*, 134 F. 2d 314). The cause was then transferred by Judge Reeves, on his own motion, to Judge Otis, and came on for trial before him, sitting without a jury. His judgment was rendered that plaintiff take nothing and from such judgment an appeal was prosecuted.

Facts As to Building and Accident.

In 1937 the defendant became the owner of the building in question which was a two story and basement residence facing north on St. John Avenue in Kansas City, Missouri; there was a wooden stairway which ran down northward from the first floor to the basement floor along the west wall of the basement; there were nine steps or treads down to a landing about four feet square, and then there were two steps on the east side of the landing down to the concrete basement floor; the treads of the step were made of two inch material resting upon wooden stringers or horses and the treads had

an overhang of one and one-half inches; the fourth tread, counting from the top, was split longitudinally into two nearly equal parts. This longitudinal split in the fourth tread had existed for many years and immediately after the accident to plaintiff was found to be filled with lint, and paint at various places had run into the split. On the morning following the accident the fourth tread was removed, preserved just as it was, and was offered in evidence upon both trials and was made a part of the record and transmitted to the Circuit Court of Appeals upon both the appeals.

In the Spring of 1938 the building had become uninhabitable and unrentable and the defendant caused its property manager to make an inspection of the entire premises to determine what should be done with the property, and it was decided that the entire house should be reconditioned throughout; on June 13th or 14th, 1938, the head of the Reconditioning Department of defendant, Roy L. Butterworth, made a thorough and complete examination of the entire house, including the basement stairs, to determine what work should be done to put the premises in a rentable, habitable and saleable condition. Butterworth in making such inspection not only worked under general instructions but under a printed instruction under which "we were required to make additional repairs other than recommendations by the Property Management Department, and appraises, anything that would be hazardous, *and we paid particular attention to stairways*, porch steps, stair rails, what we called preservative items which might cause damage to the property" (R. 74) (emphasis ours).

Butterworth, as defendant's witness, testified that he made a thorough and complete examination of the stairway, "looked at the structural part, all parts of the

steps" (R. 75); measured the steps and took the size and length of treads (73); saw cracks and splits in the tread (R. 73), and when asked by the Court—"What was your purpose in examining the stairway?" he said, "It was to see whether it was in sound condition" (R. 73). The horse or stringer under the east or right-hand end of the fourth tread was split off at the corner and one of the nails at that end of the tread did not penetrate the horse at all but stuck outside and was painted over. All of the treads were 32 inches long and the fourth tread was 9 inches wide north and south and *the front half was 3-7/8 inches wide with an overhang of one and one-half inches,* and the front half of the split tread was held in place by only one eight penny rusty nail. The fourth tread was the height of Butterworth's head when he stood on the basement floor at the east side of the stairway. In making his inspection of the stairway, Butterworth testified that he stood on the basement floor with his face close to the east end of the fourth tread and that he saw the tread from that position (R. 72, 73). He further testified, when shown the fourth tread in court, that the front half of the tread less than four inches wide with an overhang of over an inch "would be a bit dangerous" (R. 75); that he examined the steps "for all purposes, anything that was there" (R. 77); that he had instructions to see that the stairway was safe and not hazardous (R. 76). In short, Butterworth admitted that he made a thorough and detailed examination of every structural part of the stairway and saw that some of the treads were split. It was shown without dispute that the eight penny nail used in this tread was an improper size and that nothing less than a sixteen penny nail should have been used.

With full knowledge of all of the aforesaid facts Butterworth made his report to the defendant and caused

specifications to be drawn up which called for only the replacement of a broken board in the landing at the bottom of the stairs.

On or about July 30, George H. Sweeney called upon a Mr. Hess of the Kelly-Townsdin Realty Company, the rental agent of defendant, and inquired about renting this house and was told that the rent would be $25 per month, and Hess told him that they were going to spend about $800 on repairs on the place, and Sweeney got the key and went to the house and found it was unlivable without thorough repairs, and he found that the basement stairway was in bad condition and shaky, and he went back to see Mr. Hess and told him about the stairway (R. 56). And Sweeney testified: "Mr. Hess informed me from time to time not to worry about it, the place would be put in safe condition and ready for me by the first of September" (R. 57).

Mr. Hess, called by the defendant, testified that he "told Mr. Sweeney that the repairs would be generally complete" (R. 71). On or about the 15th of August, 1938, Sweeney rented the premises, occupancy to begin on September 1st. On or about that date the defendant entered into a contract with one Hansen to do the work called for by the specifications and the work was done in practically the time called for and Sweeney moved in on or about the first of September (R. 70).

Promptly after the work started the defendant employed Robert S. King, a fee inspector who worked under the same instructions, written and oral, that Butterworth worked under, and he inspected the premises five times during the progress of the work. He testified that he examined all parts of the stairway and looked at every one of the stair treads and the horses (R. 64); stood on the basement floor alongside the stairway and saw that

that piece of the stringer supporting the fourth tread was chipped off (R. 61). King had a thorough and detailed knowledge of all of the structural parts of the stairway and this was acquired pursuant to his instructions from the defendant.

On or about the 14th of November, 1938, the plaintiff went to work for the Sweeneys as a beauty operator. They conducted a beauty parlor on the first floor and Mrs. Huffman lived there until January 27, 1939, when the accident, which is the basis of this suit, occurred. At the top of the basement wall on the west side of the stairway there was a ledge upon which the Sweeneys placed various bottles of oil and liquid shampoo to be used in the business. On the day in question Mrs. Huffman went down to the fourth tread and got a gallon bottle or jug of shampoo oil and brought it up into the kitchen and there filled a small bottle and then she went to put the bottle back on the ledge and got down to the fourth tread with her right foot, with the left foot on the third tread, and while turning west or to her left to put the bottle on the ledge the front half of the split fourth tread tilted and caused her to be precipitated headlong down the stairway causing the grievous and permanent injuries set forth in the complaint.

Plaintiff sustained a concussion of the brain and was semi-conscious and irrational for ten days. She had a comminuted fracture of the right shoulder, glass penetrated her right eyelid and punctured the right eyeball; she sustained many disfiguring scars, lost a great deal of blood and blood transfusions were given and she was permanently incapacitated.

Plaintiff's Theory of Liability.

Plaintiff's amended complaint alleged, among other things:

"(3) On or about July 16, 1938, one George H. Sweeney offered to rent said premises from the defendant for Twenty-five ($25) Dollars per month upon condition that defendant would, among other things, repair said steps and put them in a reasonably safe condition for use, occupancy to begin September 1, 1938. On or about August 15, 1938, defendant accepted said offer, agreed to make said repairs and thereafter proceeded to make repairs to said steps. Prior to said offer of said Sweeney to rent said premises, one of the treads of said steps was defective and dangerous in that it was insecure and the outer portion thereof likely to tip when a person stepped or put weight upon it by reason of not being securely nailed to the stringer underneath it. In the said performance of repairs upon said stairs defendant failed to repair said tread or remedy said defective and dangerous condition of said tread, or to make said tread reasonably secure, and said tread at all times herein mentioned remained defective and dangerous in the respects heretofore stated."

"(c) In that said defective and dangerous condition of said tread was concealed and not easily discoverable by said tenant Sweeney and his employees and invitees, including plaintiff, and unknown to them, but known to defendant at the time defendant agreed to rent said premises to Sweeney and at the time defendant put Sweeney in possession of said premises, and defendant wrongfully and negligently failed to inform said Sweeney or this plaintiff of said dangerous and defective condition and wrongfully and negligently assured said Sweeney when it delivered possession of said premises to him that said premises and said steps had been repaired and were reasonably safe for use under said tenancy."

Upon the first trial before Judge Reeves the case was submitted solely upon the first aforesaid allegation, to-wit: "the negligent repair theory," and Judge Reeves rendered judgment in favor of the plaintiff for $20,000 (39 Fed. Supp. 139), and upon appeal from the judgment rendered by Judge Reeves in favor of the plaintiff the Circuit Court of Appeals reversed and remanded the case solely upon the ground that since it was not shown that the defendant did any actual work upon the fourth tread that it could not be held liable for negligently repairing said tread, the Court saying:

> "We think that negligence must in the instant case be confined to any acts of attempted repair of the fourth tread," and
>
> "We think it clear that under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who actually makes a repair and as a result of his negligence in so doing injury results" (*Home Owners Loan Corp. v. Huffman*, 124 F. 2d l. c. 687-688).

(That this holding is absolutely contrary to the law and controlling decisions of the state of Missouri, we shall later point out and demonstrate.)

Upon the trial before Judge Otis, the case was submitted not only upon the "negligent repair theory" but also upon the "concealed defect theory," that is, that when defendant rented the premises to Sweeney and put him in possession of them the defendant "wrongfully and negligently failed to inform said Sweeney or this plaintiff of said dangerous and defective condition" even though the defendant knew thereof or had knowledge of facts that put it upon inquiry as to the danger.

Notwithstanding the fact that plaintiff supplied Judge Otis, at the inception of the trial, with an exhaustive

brief covering the "concealed defect theory," Judge Otis, at the conclusion of the evidence made his findings of fact and conclusions of law and never even mentioned the "concealed defect theory" in his opinion (R. 21 to 27). Thereupon the plaintiff filed her motion for a new trial (R. 29-30), and then for the first time Judge Otis in a memorandum (R. 32) said, in substance, that plaintiff could not recover under the "concealed defect theory," "For one thing, defendant owed no duty to plaintiff or its tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread." We shall point out later that the reason given by Judge Otis is wholly untenable and his decision is contrary to the law and controlling decisions of the state of Missouri.

Sometime after the decision by the Circuit Court of Appeals, upon the first appeal, the Supreme Court of the state of Missouri handed down its opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, decided November 1, 1943, in which it specifically overruled the cases of *Davis* v. *Cities Service Co.*, (Mo. App.) 131 S. W. 2d 865, and *Logsdon* v. *Central Development Association, Inc.*, (Mo. App.) 123 S. W. 2d 631, which in substance were the bases for the opinion by Judge Gardner (see 124 F. 2d l. c. 687, and held that:

> "That it is our view that the requirement of the Restatement of the Law of Torts that the repairs must 'make the land more dangerous for use' and its appended comment to that effect should not be adopted or followed. It necessarily follows that insofar as the *Lodgson* and *Davis* cases adopted that law they should be overruled."

And further said:

> "The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right." 174 S. W. 2d l. c. 848, 849, and
>
> "A lessor of land, who conceals or fails to disclose to lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land, is subject to liability * * *, if (a) the lessee does not know of the condition or the risk involved therein, and (b) the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk."

After the rendition of the *Bartlett* opinion by the Supreme Court of Missouri the plaintiff procured an order from Judge Reeves dismissing this case without prejudice and without terms. And at that time Judge Reeves wrote a memorandum opinion on defendant's motion for costs, and in the memorandum opinion Judge Reeves said:

> "The opinion of the Court of Appeals should be considered on these motions. The Court of Appeals in its decision relied largely upon the case of *Davis* v. *Cities Service Oil Co.*, (Mo. App.) 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Appeals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, l. c. 849. The Supreme Court announced the identical principle applied at the trial of this case.
>
> "The Court quoted approvingly in Bartlett's case: 'His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.'"

And Judge Reeves further said:

> "An inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, supra.*"
>
> "The tenant (lessee) testified without equivocation that the defendant had contracted with him to put the entire premises in a safe and habitable condition and that in reliance upon that agreement he became a tenant of the property. While it was true that the defendant, through its agent, showed the tenant some particular repairs that it intended to make, this was not conclusive and was not intended to be conclusive upon the tenant as to what repairs were in fact to be made. It was the agreement that the defendant would inspect the premises and make all the repairs necessary to make the premises safe. It was the evidence that a reasonable inspection would have disclosed the obvious weakness of the fourth tread of the stairway from the bottom (top). It was not patent to an unskilled person but should have been obvious to a qualified inspector."

(The memorandum opinion of Judge Reeves is made a part of the record by Judge Otis (R. 23).)

Judge Otis made thirteen findings of fact, the last three of which are as follows:

"11. Plaintiff's injuries were not caused nor contributed to by any negligence or want of ordinary care on her part.

"12. Plaintiff was caused to fall by the sudden tipping of the fourth tread of the basement stairway as she was standing on that (and on the third) tread. The tread was caused to tip because it was (and long had been) longitudinally split into two parts; because plain-

tiff's weight was placed on the outer edge of the outer half (approximately) of the tread; because the tread had —by reason of the split and of the fact that the end of it nearest which was plaintiff's foot was held to the underlying horse by a single—and somewhat loosened—nail—a freedom of movement up and down about the fulcrum made by the connection of nail and horse. By reason of these matters the fourth tread was not safe.

"13. Any reasonable inspection of the stairway by a skillful artisan would have disclosed the longitudinal split in the fourth tread and would have put him on inquiry concerning its safety. Any reasonably careful investigation would have disclosed that the fourth tread was not reasonably safe."

Judge Gardner upon the first appeal said:

> "The crack was as apparent to Sweeney as it was to the inspector." 124 F. 2d l. c. 688.

The crack or longitudinal split was obvious to anybody. It was obvious to Butterworth and King. The "danger" was not obvious to the plaintiff else she would have been held guilty of contributory negligence as a matter of law. Since the longitudinal split in the fourth tread put Butterworth, a skilled artisan, upon 'inquiry" concerning its safety, then, under the law and controlling decisions of the state of Missouri the defendant "had reason to suspect concealed defects or dangers" and if it did not exercise reasonable diligence to satisfy itself of their non-existence before leasing, without mentioning the matter to its tenant, it will be liable (1 Tiffany on L. & T. 567). "So that the proper statement of the rule is that the landlord will not be liable for concealed defects or dangerous conditions existing at the time of the demise unless he knew of the defects OR HAD KNOWLEDGE

OF FACTS FROM WHICH HE OUGHT TO HAVE KNOWN, OR WILL BE PRESUMED TO HAVE KNOWN OF THEM" (*Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11) (Emphasis ours).

The law of Missouri as to the liability of a landlord who has knowledge of concealed defects or knowledge of some fact which puts him on inquiry concerning the existence of concealed dangers will be discussed later in our Argument.

Findings and Evidence in District Court As to Liability.

The District Court, Judge Otis, found that the fourth tread was not safe because it was split in two parts and the front half of the fourth tread was held to the underlying horse only by a single loosened nail which permitted freedom of movement up and down and that any reasonable inspection of the stairway by a skilled artisan would have disclosed the longitudinal split in the fourth tread and would have put him on inquiry concerning his safety, and any reasonable careful investigation would have disclosed that the fourth tread was not reasonably safe (R. 72). The split in the tread was obvious as found by the Court of Appeals upon the first appeal, the Court saying:

"The crack was as apparent to Sweeney as it was to the inspector."

As the split was obvious, and as Butterworth made a thorough examination of the stairway treads, then he too saw the split, and Judge Otis found that having seen the split, Butterworth was put on inquiry concerning the safety of the tread. And the Court of Appeals having found that the split was obvious, and Judge Otis having found that the split would put Butterworth on inquiry concerning its safety, then it must follow that un-

der the law of Missouri the defendant had reason to suspect the existence of concealed dangers and was *then* required to exercise reasonable diligence to satisfy itself of the non-existence of danger before leasing without mentioning the matter to its tenant, and the District Court erred in not rendering judgment for the plaintiff upon the concealed defect theory.

The District Court further found that even though the defendant admitted, by the testimony of Butterworth, that it made a full inspection of the entire stairway for the purpose of discovering defective and dangerous conditions therein, and conditions needing repairs, for the purpose of making said steps reasonably safe for use, yet since the defendant only provided in the specifications for the replacement of a board in the landing and did no work on other parts of the stairway that plaintiff could not recover.

Judge Otis found, in substance, that the defendant did not "undertake" to repair the stairway even though it made a full inspection for the purpose of determining the safety of the stairway but did undertake to repair or replace the board in the landing, because it actually did some work on the landing. In other words, Judge Otis found and held that the defendant could not legally "undertake" the repair of the stairway unless it actually did some work on the fourth tread. He also held that the landing was not a part of the stairway because it was a separate unit, saying: "But the landing is one unit, the basement stairway is a different unit * * *."

We contend that the whole wooden structure from the first floor to the basement floor constituted the basement stairway and that the landing is just as much a part of the stairway as each step or tread was. The defendant having admitted that it agreed to make the

whole premises, including the stairway, safe, and having made a full inspection and examination of the stairway for the purpose of making it safe, the fine spun theory of Judge Otis that the landing is a separate unit and no part of the stairway is untenable and contrary to the undisputed evidence.

While Judge Otis did not make any mention of the concealed defect theory in his original opinion, he did file a memorandum and order on plaintiff's motion for new trial (R. 32) in which he discussed the "concealed defect theory" as follows:

> "2. It was said by counsel that if in the trial the evidence was essentially the same as in the earlier trial, nevertheless a new issue was emphasized at this trial, the issue of hidden, latent, defect, known to the landlord and concealed from the tenant. Our findings, 11, 12 and 13, are pointed to as relevant to that issue and as proving plaintiff's theory in connection with that issue. We think the conclusion is a *non-sequitur*. For one thing, defendant owed no duty to plaintiff or its tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread."

While the above quotation is not a finding of fact it does reflect the trial court's view as to the law. Judge Otis in substance held that even though he had found that the split was obvious and that Butterworth in inspecting the stairway saw the split and that seeing the split put him on inquiry concerning its safety, the plaintiff was not entitled to recover upon the concealed defect theory because the defendant owed to plaintiff no duty to make an inspection of the stairway on which plaintiff was injured. This holding is in direct conflict

with the law and controlling decisions of Missouri, as has been heretofore pointed out and which will be more fully presented in our Argument.

Rulings of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the judgment of the trial court and held that since "the defective fourth tread of the stairway which caused plaintiff's injuries had remained untouched by the landlord from the time of renting of the premises until the time of the injury" the plaintiff could not recover. This holding is in direct conflict with the law and controlling decisions of the Supreme Court of Missouri in *Bartlett* v. *Taylor,* 174 S. W. 2d 844, and with *Vollrath* v. *Stevens,* 202 S. W. 283-286; *Lasky* v. *Rudman,* 337 Mo. 555, 85 S. W. 2d 501, and *Shaw* v. *Butterworth,* 327 Mo. 622, 38 S. W. 2d 57.

And with reference to the "concealed defect theory" the Circuit Court of Appeals refused to follow and apply Findings of Fact 12 and 13 made by the Trial Court (R. 26, 27) that Butterworth having seen the obvious longitudinal split in the fourth tread was put on inquiry concerning its safety and any reasonably careful investigation would have revealed that the fourth tread was not reasonably safe, and refused to follow and apply the last and controlling decisions of Missouri, *Meade* v. *Montrose,* 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell,* 124 Mo. App. 317, 101 S. W. 606; *Griffin* v. *Freeman,* 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin,* 183 Mo. 164, 81 S. W. 1094; *Mahnken* v. *Gillespie,* 329 Mo. 51, 42 S. W. 2d 797, and *Streckenfinger* v. *Bullock,* 60 S. W. 2d 661.

The Circuit Court of Appeals erroneously held that the case of *Bartlett* v. *Taylor,* 174 S. W. 2d 844, handed down by the Supreme Court of Missouri after the de-

cision of the Circuit Court of Appeals herein on the first appeal, did not overrule the basis of Judge Gardner's opinion upon the first appeal to the effect that the defendant is not liable unless it actually worked upon the fourth tread and negligently made it worse. The holding, that since the defective fourth tread remained untouched by the defendant it cannot be liable, is contrary to the *Bartlett* case, and the other cases cited, and is particularly contrary to the case of *Vollrath* v. *Stevens*, 202 S. W. 283, where the Court said:

> "* * * However, when defendant took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not non-feasance."

B.

STATEMENT OF JURISDICTION OF THIS COURT.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. Code, Sec. 347 (a)), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. Code, Sec. 350).

The case properly originated in the United States District Court under Sec. 24 (1) of the Judicial Code as amended by the Act of March 3, 1911, Ch. 231, Sec. 24, 36 Stat. 1091 (28 U. S. Code, Sec. 41 (1)) and the Act of February 13, 1925, Ch. 229, Sec. 12, 43 Stat. 941 (28 U. S.

Code, Sec. 42), as a proceeding brought against a corporation incorporated under an Act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock, with authority to sue and be sued in any court of competent jurisdiction, Federal or State, Act of June 13, 1933, Ch. 64, Sec. 4, 48 Stat. 129; April 27, 1934, Ch. 168, Secs. 1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, Ch. 847, Secs. 506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, Ch. 150, Secs. 10-16, 17 (a), 49 Stat. 296-297, (12 U. S. Code, Sec. 1463 (a) and (b).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered on June 27, 1945. Plaintiff, as appellee, filed a petition for rehearing on July 12, 1945, which the Circuit Court of Appeals denied on July ....., 1945. The Circuit Court of Appeals has stayed its mandate until September 3, 1945, and pending the filing of a petition for *certiorari*, evidenced by a certificate therefor by the Clerk of this Court, and certificate of the Clerk of the Circuit Court of Appeals filed with the petition here. This petition for *certiorari* and supporting transcript of the record are filed prior to September 3, 1945, with the request that the Clerk of this Court send to the Clerk of the Circuit Court of Appeals certificate of the filing thereof.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court.

The case is an action for damages for personal injuries caused by the negligent failure of the defendant

landlord to repair the fourth tread of the basement stairway of the rented premises, when defendant had undertaken to repair the stairway, and the negligent failure of the defendant to warn the plaintiff or the tenant George H. Sweeney of the dangerous and defective condition of the fourth tread when the defendant knew of said dangers and was put upon inquiry as to said defective conditions when the defendant rented the premises to said Sweeney and put him in possession thereof.

The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment for defendant rendered upon a trial in the United States District Court without a jury. The Circuit Court of Appeals ruled that under the Missouri law plaintiff could recover from the defendant in tort only on account of negligence of defendant in *acts of actually attempted repair to the fourth tread of the stairway* thereby ruling in conflict with applicable Missouri decisions to the effect that a landlord who assumes to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them (*Bartlett* v. *Taylor*, 174 S. W. 2d 844; *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503; *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. 2d 57, 62; *Vollrath* v. *Stevens*, 202 S. W. 283, 286).

The Circuit Court of Appeals also ruled that the defendant assumed to repair only the bottom landing of the stairway, contrary to the undisputed evidence that defendant assumed to repair and put in good condition the entire stairway (R. 55, 56, 57, 71, 72, 73, 74, 75, 76, 77).

The Circuit Court of Appeals refused to follow and apply the Trial Court's Findings of Fact 12 and 13 and

refused to follow and apply the last and controlling decisions of Missouri that if the defendant sees an obvious defect such as the longitudinal split in the fourth tread it was put on inquiry as to its safety and that there then arose a duty upon the defendant to pursue the inquiry and exercise reasonable diligence to satisfy itself of the non-existence of any danger before leasing without mentioning the matter to the tenant Sweeney or the Plaintiff, and refused to apply the law of Missouri that the defendant having knowledge of the existence of the longitudinal split and having knowledge of facts from which it ought to have known or will be presumed to have known of the dangers the defendant is liable.

(4) Cases believed to sustain the jurisdiction of this Court. The decision of question of defendant's negligence in conflict with controlling Missouri decisions.

Bartlett v. *Taylor*, 174 S. W. 2d 844.

Vollrath v. *Stevens*, 202 S. W. 283.

Lasky v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503.

Shaw v. *Butterworth*, 327 Mo. 622, 38 S. W. 2d 57, 70.

Kennedy v. *Bressmer*, 154 S. W. 2d 401.

Armbruster v. *Leavitt Realty & Inv. Co.*, 107 S. W. 2d 74.

Vitale v. *Duerbeck Estate*, 62 S. W. 2d 559.

Finer v. *Nichols*, 157 S. W. 1023.

Masonic Home of Mo. v. *Windsor*, 92 S. W. 2d 713.

As to concealed defects:

Meade v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11.

Meyers v. *Russell*, 124 Mo. App. 317, 101 S. W. 606.

Griffin v. *Freeman*, 181 Mo. App. 203, 168 S. W. 219.

Whitley v. *McLaughlin*, 183 Mo. 164, 81 S. W. 1094.

Mahnken v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d 797.

Helzberg v. *Ocean Accident & Guar. Co.*, 132 Fed. Sec. 438.

C.

THE QUESTIONS PRESENTED.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair to the fourth tread* of the stairway, has the Circuit Court of Appeals decided an important question of local law in a way in conflict with the applicable local decisions, *Bartlett* v. *Taylor*, 174 S. W. 2d 822; *Kennedy* v. *Bressmer*, 154 S. W. 2d l. c. 403; *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 501; *Vollrath* v. *Stevens*, 199 Mo. App. 5, 202 S. W. 283, 285; *Shaw* v. *Butterworth*, 327 Mo. 622, 628, 38 S. W. 2d 57, 60; *Bloecker* v. *Duerbeck's Est.*, 333 Mo. 359, 62 S. W. 2d 553?

(2) In ruling that under the Missouri law plaintiff could not recover under the "concealed defect theory" even though the defendant prior to the letting of the premises to Sweeney knew of the longitudinal split in the fourth tread and failed to inform Sweeney or the plaintiff of the dangerous and defective condition has the Circuit Court of Appeals decided an important question of the local law in a way in conflict with the applicable local decisions, *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell*, 124 Mo. App.

317, 101 S. W. 606; *Griffin* v. *Freeman*, 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin*, 183 Mo. 164, 81 S. W. 1094, 66 L. R. A. 484; *Mahnken* v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d 797; *Streckenfinger* v. *Bullock*, 60 S. W. 2d 661?

(3) In ruling the question of defendant's negligence both as to negligent repair and concealed defect, points 1 and 2 above, contrary to the Missouri decisions, has the Circuit Court of Appeals decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court? Since Federal jurisdiction of plaintiff's case is based upon the fact that the defendant is a Federal Corporation, has the Circuit Court of Appeals decided an important question of Federal law which has not been, but should be settled by this Court?

(4) In holding that the plaintiff was not entitled to recover even though the longitudinal split in the fourth tread was obvious and was seen and observed by Butterworth, defendant's reconditioning expert, contrary to the findings 12 and 13 of the District Court, and the evidence, has the Circuit Court of Appeals violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure, that "findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness"? And has the Circuit Court of Appeals thereby decided an important question of Federal law which has not been, but should be, settled by this Court, or has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, or render a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

(5) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the undisputed evidence, that defendant in fact, negligently failed to exercise ordinary care to repair the fourth tread although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition and although prior to the letting it had knowledge of facts which put it upon inquiry as to the dangerous and defective condition of the fourth tread, has the Circuit Court of Appeals violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness"? And has the Circuit Court of Appeals thereby decided an important question of Federal law which has not been, but should be, settled by this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair to the fourth tread* of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable local decisions,

Bartlett v. *Taylor*, 174 S. W. 2d 844;

Vollrath v. *Stevens*, 202 S. W. 283;
Lasky v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503;
Shaw v. *Butterworth*, 327 Mo. 622, 38 S. W. 2d 57, 60;
Kennedy v. *Bressmer*, 154 S. W. 2d 401;
Armbruster v. *Leavitt Realty & Inv. Co.*, 107 S. W. 2d 74;
Vitale v. *Duerbeck Estate*, 62 S. W. 2d 559;
Finer v. *Nichols*, 157 S. W. 1023;
Masonic Home of Mo. v. *Windsor*, 92 S. W. 2d 713,

to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless* of whether the landlord had *actual knowledge* of the defects or actually *attempted to remedy them.*

(2) In ruling the aforesaid question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins*, and other applicable decisions of this Court.

(3) In ruling that under the Missouri law governing the "concealed defect theory" plaintiff could not recover even though prior to the letting it had knowledge of the longitudinal split in the fourth tread and was thereby put upon inquiry as to its safety and had knowledge of facts from which it ought to have known or will be presumed to have known of the dangerous condition

of the fourth tread, the Circuit Court of Appeals has decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court, and the Circuit Court of Appeals has decided an important question of local law in conflict with the applicable local decisions, *Meade* v. *Montrose,* 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell,* 124 Mo. App. 317, 101 S. W. 606; *Griffin* v. *Freeman,* 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin,* 183 Mo. 164, 81 S. W. 1094; *Mahnken* v. *Gillespie,* 329 Mo. 51, 42 S. W. 2d 797; to the effect that a landlord who had knowledge of concealed defects or dangerous conditions existing at the time of the demise or who had knowledge of facts which he ought to have known, or will be presumed to have known, of them, is liable to his tenant, and those in privy under him, unless he warns or informs the tenant and such persons of the dangerous and defective conditions. Under the law of Missouri, it is not necessary that a landlord must *know the danger concealed in this tread.* He is liable if he is aware of any condition which "puts him on inquiry concerning its safety," and he fails to exercise reasonable diligence to satisfy himself of the non-existence of the danger about which he is "put on inquiry," and fails to warn his prospective tenant thereof.

The Circuit Court of Appeals held that "plaintiff had not proved that defendant knew, at the time of the letting, of the defect that caused the accident," and affirmed the judgment of the trial court upon that ground, but it failed or refused to take into consideration the undisputed evidence that Butterworth knew of the longi-

tudinal split in the fourth tread and refused to apply and follow Findings of Fact 12 and 13 that such knowledge put the defendant on inquiry as to the safety of the tread, and failed or refused to follow the law of Missouri that knowledge of facts which put a landlord upon inquiry as to the safety of the tread is equivalent to knowledge of the defect itself, all contrary to the decisions aforesaid.

CONCLUSION.

Petitioner respectfully avers that the affirmance of defendant's judgment is based upon the decision of the Circuit Court of Appeals of important questions of Missouri law contrary to the applicable Missouri decisions, fortified by rulings of the Court in disregard of findings of fact 12 and 13 of the District Court which were amply supported by the evidence, in violation of Rule 52 (a), of the Rules of Federal Procedure.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 13023, Civil, *Mae Huffman, Appellant,* v. *Home Owners' Loan Corporation, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United

States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of *certiorari;* and your petitioner prays that she may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law; and your petitioner will ever pray.

Mae Huffman,
Petitioner,
PRICE WICKERSHAM,
Bryant Building,
Kansas City, Missouri,
CLAY C. ROGERS,
Bryant Building,
Kansas City, Missouri,
Counsel for Petitioner.

Supreme Court of the United States

OCOTBER TERM, 1945.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, entered June 27, 1945 (R.), is not yet reported. The opinion of the District Court (R. 21, 27) is not yet reported.

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this Court is invoked, meeting the requirements of Rule 12, Par. 1, has been made under "Statement of the Jurisdiction of this Court," Part B, of the foregoing petition for *certiorari*, which is adopted and made a part of this brief.

III.

STATEMENT OF THE CASE.

Plaintiff has stated the case in the "Summary Statement of the Matter Involved," Part A, of the foregoing petition for *certiorari*, which is adopted and made a part of this brief.

After the judgment for plaintiff rendered by Judge Reeves was reversed and remanded upon the first appeal, and after the Supreme Court of Missouri had handed down its opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, the defendant filed a motion for costs, and Judge Reeves filed his memorandum opinion on motion for costs. Upon the second trial before Judge Otis he made Judge Reeves's memorandum opinion a part of the record (R. 23), and that part of the opinion of Judge Reeves germane here is as follows:

> "4. The opinion of the Court of Appeals should be considered on these motions. The Court of Appeals in its decision relied largely on the case of *Davis* v. *Cities Service Oil Co.*, (Mo. App.) 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Ap-

peals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, l. c. 849. The Supreme Court announced the identical principle applied at the trial of this case.

The Court quoted approvingly in Bartlett's case:

"'His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.'"

"This was a quotation from *Marks* v. *Nambil Realty Co.*, 245 N. Y. 256, 157 N. E. 129. In that case the revered Mr. Justice Cardozo, who was at that time one of the New York Appellate Judges, prepared the opinion.

"The Supreme Court of Missouri then reached its conclusion and said:

> 'It is our view that the requirement of the Restatement of the Law of Torts that the repairs must "make the land more dangerous for use" and its appended comment to that effect should not be adopted or followed. *It necessarily follows that in so far as the Logsdon and Davis cases adopt that rule they are and should be overruled.*'

"5. An inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, supra.*

"The tenant (lessee) testified without equivocation that the defendant had contracted with him to put the entire premises in a safe and habitable condition and that in reliance upon that agreement he became a tenant of the property. While it was true that the defendant, through its agent, showed the tenant some particular repairs that it intended to make, this was not conclusive and was not intended to

be conclusive upon the tenant as to what repairs were in fact to be made. It was the agreement that the defendant would inspect the premises and make all the repairs necessary to make the premises safe. It was the evidence that a reasonable inspection would have disclosed the obvious weakness of the fourth tread of the stairway from the bottom. It was not patent to an unskilled person but should have been obvious to a qualified inspector.

"Findings of Fact were made with respect to those matters but the Court of Appeals did not consider such findings. In its opinion, it said:

> 'But if, for the sake of argument, it be assumed that the defendant might be held for any failure to exercise ordinary care in the repair of the entire stairway, we do not believe there is substantial evidence to sustain the judgment.'

"Findings of Fact were made by the trial court, that there was substantial testimony on that identical question. The Court of Appeals did not point out wherein the testimony failed but merely expressed the opinion without comment that the fact was not sustained. Rule 52 of the New Rules of Civil Procedure particularly provides that:

> 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

"Such a rule is predicated, of course, upon the 7th Amendment to the Constitution of the United States. This Amendment preserves the right of trial by jury and then provides as follows:

> '* * * and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.'

"It should be noted that in the *Bartlett case, supra*, recovery was permitted notwithstanding the fact that the plaintiff was experienced in carpentry and therefore somewhat familiar with the identical matters which occasioned his injury."

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in deciding that under the Missouri law plaintiff was not entitled to recover from the defendant except for negligence of the defendant in *acts* of actually attempted repair to the fourth tread of the stairway in question.

(2) The Circuit Court of Appeals erred in deciding the question of defendant's negligence contrary to the law of Missouri and in not holding that if the defendant *assumed* to repair the stairway it was liable for failure to exercise ordinary care to discover and repair the defective fourth tread, even though defendant performed no repairs upon that tread.

(3) The Circuit Court of Appeals erred in deciding that the Supreme Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844 did not overrule the basis of the decision of the Circuit Court of Appeals upon the first appeal, 124 F. 2d 684.

(4) The Circuit Court of Appeals erred in deciding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway contrary to the undisputed evidence that the defendant assumed to repair the entire stairway and entered upon the performance thereof by making an in-

spection and examination of all structural parts of the stairway.

(5) The Circuit Court of Appeals erred in deciding that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the undisputed and overwhelming evidence that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care could and should have known of the defective and dangerous condition which caused plaintiff's injury, and although, prior to the letting to Sweeney, it had knowledge of facts which put it on inquiry as to said defective and dangerous condition.

(6) The Circuit Court of Appeals erred in refusing to follow and be bound by the trial court's Findings of Fact 12 and 13.

(7) The Circuit Court of Appeals erred in deciding that plaintiff was not entitled to recover under the concealed defect theory when the trial court had made its findings of fact, supported by ample and sufficient evidence, that defendant, through Butterworth, had knowledge of the longitudinal split in the fourth tread and was thereby put upon inquiry as to the safety of the tread, and notwithstanding such knowledge negligently failed to inform its tenant or plaintiff of the dangerous condition.

(8) The Circuit Court of Appeals erred in not following and applying the law and controlling decisions of the state of Missouri holding that a landlord is liable to a tenant or his invitees if the landlord, prior to letting, knew of dangerous conditions or had knowledge of

facts from which he ought to have known, or will be presumed to have known of them. The trial court having found that the defendant had knowledge, prior to the letting, of the existence of a longitudinal split and that such knowledge would have put the defendant on inquiry concerning the safety of the fourth tread, the Circuit Court of Appeals erred in not ordering judgment for the plaintiff, and remanding the cause for the assessment of damages.

V.

SUMMARY OF THE ARGUMENT.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts* of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a

federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed by any federal statute or federal policy. The rule of *Erie R. R. Co.* v. *Tompkins* applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of *Erie R. R. Co.* v. *Tompkins* is not strictly applicable.

Point C.

In ruling that the plaintiff is not entitled to recover under the concealed defect theory, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The Circuit Court of Appeals having held that the longitudinal split was obvious, and the trial court having made its Findings of Fact 12 and 13 that the defendant, prior to the letting, knew of the longitudinal split and was thereby put on inquiry concerning the safety of the fourth tread, the Circuit Court of Appeals has refused to follow and be bound by the last and controlling decisions of the state of Missouri holding that a landlord is liable to his tenant or his invitees if prior to the letting the landlord knew of the dangerous condition or had knowledge of facts that put it on inquiry concerning the safety of the tread or had knowledge of facts from which it will be presumed it had knowledge of the safety of the tread. The Circuit Court of Appeals refused to apply and follow the law as announced in *Meade* v. *Montrose*, 173 Mo. App. 722, and other applicable decisions.

Point D.

The trial court having made its Findings of Fact 12 and 13 which were supported by ample evidence, and having made its finding of fact that the longitudinal split was obvious and that the defendant prior to the letting knew thereof and was thereby put on inquiry concerning the safety of the fourth tread the Circuit Court of Appeals has violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure.

ARGUMENT.

From the foregoing "Summary Statement of the Matter Involved," Part A of the foregoing petition, the following simple facts appear.

The defendant was the owner of this untenantable and unsaleable house; it decided in the Spring of 1938 that the house should be reconditioned throughout, including the basement stairway, and in June, 1938, had the head of its reconditioning department, Roy L. Butterworth, make a detailed inspection and examination of the premises, including the basement stairway, for the purpose of preparing specifications for such reconditioning; in June, 1938, Butterworth made this inspection and examination and examined all the structural parts of the basement stairway for the purpose of determining that it was in sound condition; there was a longitudinal split in the fourth tread, counting from the top, which had existed for a long time; the tread was 32 inches long and the two parts thereof were about 9 inches wide leaving the front half about three and seven-eighths inches; it was made of two inch material planed to one and seven eighths. The crack was filled with lint and paint had run down into the crack; the overhang was one and one-half inches; the horse underneath the tread at the east end was split away; there were two eight penny nails at the east end of the front half of the tread; one of these nails did not penetrate the horse underneath the tread because the horse had been split away, and the nail protruded outside the horse and was covered with paint so that only one eight penny nail, which was rusty, held the east end of the front half of the fourth tread; Butterworth, in inspecting the stairway stood on

the basement floor with his face just a short distance from the east end of the tread and he saw its condition; the undisputed testimony was that the tread being split in two and having an overhang of an inch and a half was not safe; the trial court found in Findings of Fact 12 and 13 that the tread was not safe by reason of the aforesaid facts; the Circuit Court of Appeals upon the first appeal held that the longitudinal split was obvious; the trial court upon the second trial held that knowledge of the longitudinal split would have put a skilled artisan, Butterworth, on inquiry as to the safety of the tread.

For some reason, not shown by the evidence, Butterworth failed to list the repair of the fourth tread in his specifications but included in them only the replacement of a broken board in the landing

In the latter part of July, 1938, George H. Sweeney, noticing that the premises were for rent, went to the rental agent of the defendant and obtained the key to the house and looked it over and went up and down the basement stairs and found that they were shaky and not in good condition, and he went back to the agent and told him, among other things, that the basement stairway was not in good condition. And the agent advised him that the defendant was going to spend some $800 in repairs on the place and Hess, the agent, told him that the repairs "would be generally complete" and "that the house would be placed in rentable condition" (R. 71), which is the testimony of Hess called as a witness by the defendant. Sweeney then agreed to rent the premises for $25 a month, occupancy to begin September 1st; on August 15, 1938, he paid the first month's rent. At that time the defendant let a contract to one Hansen to recondition the premises as provided by the specifications which the defendant had prepared. From the time the

work started in August until it was completed shortly after the first of September, the defendant employed Robert S. King, an inspector, and his duties were not only to inspect the work done by Hansen but also to inspect the premises for anything that would be hazardous, and in the performance of his duties he made five inspections of the basement stairway, examining all structural parts, the treads, stringers, the supports and all parts of the stairway.

On September 1, 1938, Sweeney and his family moved into the premises, and in November the plaintiff was employed by Sweeney and his wife as a beauty operator and lived in the house and remained there until January 27, 1939, when she was hurt as shown in the "Summary Statement of the Matter Involved" in the petition.

Upon the first trial before Judge Reeves, sitting without a jury, the plaintiff submitted her case solely upon the "negligent repair theory" and the Court rendered judgment in favor of the plaintiff for $20,000, and made his separate findings of fact and conclusions of law. Upon appeal the Circuit Court of Appeals reversed and remanded the judgment holding that the defendant was not liable because the plaintiff had failed to prove that the defendant had *actually* attempted to repair the fourth tread. Thereafter the Supreme Court of Missouri in the case of *Bartlett* v. *Taylor,* 174 S. W. 2d 844, overruled the case of *Davis* v. *Cities Service Co.,* 110 S. W. 2d 865, which had been relied upon and was the actual basis for the decision of the Circuit Court of Appeals in reversing the judgment rendered by Judge Reeves. The *Davis* case had held in substance that a landlord is not liable for negligent repairs unless he makes "the land more dangerous for use," in other words, that a plaintiff must show that the defendant actually worked upon

the defective step or place and negligently repaired the same before the defendant landlord could be held liable. The *Bartlett* case overruled the *Davis* case holding:

> "It is our view that the requirement of the Restatement of the Law of Tort that the repairs must 'make the land more dangerous for use' and its applied comment to that effect should not be adopted or approved. It necessarily follows that insofar as the *Logsdon* and *Davis* cases adopted that rule they should be overruled."

After the decision in the *Bartlett* case the plaintiff sought to have the court dismiss this action without prejudice and the defendant made a motion for costs. The trial court entered its order dismissing the case without imposing terms and Judge Reeves filed his memorandum opinion in which he pointed out:

> "The Court of Appeals in its decision relied largely upon the case of *Davis* v. *Cities Service Oil Co. et al.*, 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Appeals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor,* 174 S. W. 2d 844, l. c. 849.
>
> The Supreme Court announced the identical principle applied at the trial of this case," and "an inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, Supra.*"

The Court of Appeals reversed Judge Reeves and held that even though the plaintiff had filed her affidavit that she was a pauper the trial court had no authority to dismiss the case without prejudice since plaintiff's counsel, having a contingent contract, had not filed an affidavit that they were paupers, thereby holding in

effect that counsel for plaintiff were required to pay the costs of the litigation which would make them subject to the charge of champerty and maintenance if they had made such an agreement when they were employed by plaintiff as her counsel.

The order of dismissal was thus revoked and Judge Reeves then, of his own motion, transferred the case to Judge Otis to try. Upon the trial before Judge Otis the case was submitted upon both the negligent repair theory and the concealed defect theory and extensive trial briefs were furnished the Court upon both theories. Judge Otis found for the defendant and made his separate findings of fact and conclusions of law but did not pass upon the concealed defect theory. Thereupon the plaintiff made her motion for new trial and called the Court's attention to the fact that the concealed defect theory had not been mentioned in his opinion. It was then for the first time that Judge Otis decided that issue in the memorandum and order (R. 32). Judge Otis said:

> "2. It was said by counsel that if in the trial the evidence was essentially the same as in the earlier trial, nevertheless a new issue was emphasized at this trial, the issue of hidden, latent, defect, known to the landlord and concealed from the tenant. Our findings 11, 12 and 13, are pointed to as relevant to that issue and as proving plaintiff's theory in connection with that issue. We think the conclusion is a *non-sequitur*. For one thing, defendant owed no duty to plaintiff or his tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread."

The reason given by Judge Otis as to why the plaintiff was not entitled to recover under the concealed de-

fect theory that "defendant owed no duty to plaintiff or his tenant to make an inspection of the stairway on which plaintiff was injured * * *" shows plainly that he had an erroneous conception of the law of Missouri that if a landlord has knowledge of facts which put him on inquiry as to the safety of the tread, such knowledge is equivalent to actual knowledge of the defect and defendant is liable if he fails to inform the tenant or the plaintiff thereof. We shall discuss this subject later.

After the Circuit Court of Appeals affirmed the judgment for the defendant rendered by Judge Otis, the plaintiff filed her petition for rehearing. As plaintiff is a legal pauper, in order to save expense and to simplify the argument, we have decided to use the petition for rehearing as a part of this argument, as it expresses concisely our views. The petition is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 13023.

CIVIL.

MAE HUFFMAN, APPELLANT,

VS.

HOME OWNERS LOAN CORPORATION, APPELLEE.

PETITION FOR REHEARING.

Now comes appellant and petitions the court to grant her a rehearing herein because of material matters of law and fact overlooked by the court as shown by its opinion, to-wit:

The trial court and this court wrongfully refused to follow and apply the law of Missouri as expressed in the last and controlling decisions of Missouri appellate courts in respect to the duty of a landlord who is "put on inquiry" as to the existence of dangerous conditions before letting premises. Both courts refused to follow and apply the Missouri law as expressed in *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11; *Myers* v. *Russell*, 124 Mo. App. 317, 101 S. W. 606; *Mahnken* v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d

797, and other similar cases cited in appellant's brief under Argument I.

The court, in deciding the "concealed defect" issue against appellant at the bottom of page 6 of the opinion said:

> "It (trial court) manifestly believed that plaintiff had not proved that defendant knew at the time of the letting of the defect that caused the accident."

And on page 7 of the opinion, the court said:

> "But the issue as to alleged fact of defendant's knowledge of the defect at the time of the letting was submitted to the court as trier of the facts, and its determination of the fact issue against the plaintiff is binding on this court unless clearly erroneous."

In short, since Judge Otis found that defendant did not *know* of the *defect* before the letting, this court is bound by that finding unless it is clearly erroneous.

And on page 7: "we find no evidence in the record to justify reversal of the trial court's determination that plaintiff failed to prove her charge that the defect in the fourth tread that caused the accident was known to defendant and concealed from plaintiff."

In other words, not only does this court hold that Judge Otis found that defendant did not know of the defect that caused the accident, but this court finds "no evidence in the record to justify reversal of the trial court's determination * * *," which means that this court has read and considered the evidence on that subject.

Appellant contends that Judge Otis did not find that defendant did not know of the defect, but on the contrary, he did find that defendant knew of the defect, because he said the defendant was not liable because "defendant

owed no duty to plaintiff or his tenant to make an inspection of the stairway * * * and defendant did not undertake to inspect or repair the fourth tread" (R. 32).

If Judge Otis' Findings of Fact 12 and 13 can be construed to mean that plaintiff had failed to prove that the defendant knew of the defect, the findings are clearly erroneous under the undisputed testimony and the judgment is contrary to the last and controlling decisions of the State of Missouri, *supra*.

Judge Otis found that the defect consisted of: (a) The tread "was (and long had been) longitudinally split in two parts." (This was an obvious defect and so found to be by this court in its previous opinion.) (b) The tread had—by reason of the split and of the fact that one end "was held to the underlying horse by a single—and loosened—nail—a freedom of movement up and down about the fulcrum made by the connection of nail and horse." (This, under the construction placed by this court upon the finding, is the concealed defect and danger.)

In other words, the tread was longitudinally split in two parts and was not properly nailed so that the front part of the tread moved up and down. Judge Otis said:

> "By reason of these matters the tread was not reasonably safe."

The latter reason, movement of the tread, was a finding *additional* to those found by Judge Reeves.

Judge Otis then found in Finding of Fact 13 that:

> "Any reasonable inspection of the stairway by a *skilled artisan* would have disclosed the longitudinal split in the fourth tread, and would have put him on inquiry concerning its safety. Any reasonably careful inspection would have disclosed that the fourth tread was not reasonably safe."

This court on first appeal, Judge Gardner speaking, said:

> "The crack was as apparent to Sweeney as it was to the inspector."

The longitudinal split was *obvious* to anybody. It was obvious to the plaintiff but the *danger* was not obvious to her, else she would have been held guilty of contributory negligence. (See Judge Otis' Finding of Fact No. 11.) Butterworth admitted that he made "an examination of the treads in the stairway" (R. 73); saw cracks and splits in the stairway and made the examination "to see whether it (the stairway) was in sound condition" (R. 73); saw "there was a number of treads in the stairway that was split" (R. 73); took "the size and length of the treads" (R. 73); he "made an inspection of the basement stairs before Hansen began any work on it" (R. 73).

This undisputed testimony of Butterworth, defendant's Reconditioning Inspector, proves without question that he saw the longitudinal split in the fourth tread which was obvious to anybody. An examination of photograph, plaintiff's Exhibit 5, demonstrates this.

So it is admitted, or proved conclusively, that Butterworth saw the split fourth tread before the letting. Under Finding of Fact 13 his knowledge of this fact "put him on inquiry concerning its safety." He "looked at the structural parts, all parts of the steps" (R. 73) and knew the tread had an overhang of 1 1/2 inches. Let us concede for the sake of argument that Butterworth did not know at the time he made his inspection and examination of the stairway and treads anything about how this tread was nailed and did not know that there was a "freedom of movement up and down" of the front half of this tread. Let us say, for argument, that all he saw was the longitudinal split, then under Finding of Fact 13 and the law

of Missouri (*Meade* v. *Montrose et al., supra*) plaintiff is entitled to judgment.

Since Butterworth, a skilled artisan, saw the split and the trial court found as a fact that knowledge of the split "*would have put him on inquiry concerning its safety*" a duty *then* arose to "pursue" the inquiry to find out the "danger." And the defendant thus being "put on inquiry concerning its safety" is liable if it failed to "mention the matter to his tenant" before letting.

Under the law of Missouri it is not necessary that a landlord must *know the danger concealed in this tread.* He is liable if he is aware of any condition which "puts him on inquiry concerning its safety," and he fails to exercise reasonable diligence to satisfy himself of the non-existence of the danger about which he is "put on inquiry," and fails to warn his prospective tenant thereof.

Before the defendant let the premises to Sweeney the defendant owed no legal duty to hunt for concealed defects, that is, those defects that are not easily discoverable by a tenant, but if the landlord sees something that "puts him on inquiry," or suggests to him, or gives him reason to suspect the existence of danger, then the landlord must exercise reasonable diligence to satisfy himself of the non-existence of danger before leasing without mentioning the matter to his tenant, else he will be liable.

This court has failed to recognize the difference under Missouri law between knowledge of defects and knowledge of any fact that puts a landlord on inquiry concerning safety. Under Missouri law "reason to suspect" danger is sufficient to impose liability. "Knowledge of facts from which he ought to have known, or will be presumed to have known, of them (concealed defects or dangers)" is sufficient to impose liability upon

a landlord who lets premises with such presumptive knowledge.

The law of Missouri is clearly shown in the Missouri cases cited in appellant's brief, but in none more clearly than in *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11, where the court said:

> "If there is some hidden defect known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and if he fails to do so, he is liable to the tenant for injuries arising therefrom * * * But in order to make the landlord liable for such hidden defects under such exception, it must be shown that they were known to him, or that they were those the existence of which he had reasonable grounds to suspect (1 Tiffany on L. & T. 651-2). The statement contained in this last clause does not mean that if the landlord had no reason to suspect concealed defects or dangers, nevertheless he must make an examination in an effort to discover them, or else he will be held liable. *It only means that if he had reason to suspect their existence, and did not exercise reasonable diligence to satisfy himself of their non-existence before leasing without mentioning the matter to his tenant, he will be liable* (1 Tiffany on L. & T. 567). So that the proper statement of the rule is that the landlord will not be liable for concealed defects or dangerous conditions existing at the time of the demise unless he knew of the defects or *had knowledge of facts from which he ought to have known, or will be presumed to have known*, of them" (Italics ours).

It is evident that this court has misunderstood the law of Missouri or has refused to follow and apply it.

If appellant were to concede, which she does not, that everything which this court says upon this issue is

sound law, we still say that appellant is entitled to judgment under the law of Missouri as expressed in *Meade* v. *Montrose et al.*, because: (a) the longitudinal split was obvious and Judge Otis found that the split put the defendant on inquiry concerning the safety of the tread.

Respondent in its Brief pages 12 and 13, contends that the longitudinal split was obvious. It says: "Anyone looking at it could see it was split"; "there is no question but what the split was discoverable as this court held in its former opinion." And respondent argues that since the split was obvious "it was not in any event a concealed defect." Of course, the split was not a concealed defect, but that fact or conclusion is beside the point. The trial court found that knowledge of the split "by a skilled artisan (meaning Butterworth) * * * would have put him on inquiry concerning its safety."

It is that "knowledge of facts from which he ought to have known, or will be presumed to have known, of them" that created a duty to "exercise reasonable diligence to satisfy himself of their non-existence before leaving without mentioning the matter to his tenant."

The phrase "satisfying himself of their non-existence" as used in the *Meade* v. *Montrose* case, applied to the facts of this cause, does not mean the existence of the longitudinal split (because that existed and was obvious) but it means the non-existence of a concealed danger which knowledge of the existence of the split "put him (Butterworth) on inquiry concerning its safety."

This court holds that plaintiff is not entitled to recover because "plaintiff had not proved that defendant knew, at the time of the letting, of the defect that caused the injury," the trial court having so found, and this court after examining the evidence so finding also. The

trial court, and this court, in so holding, deny to plaintiff her right to recover if she proved that defendant "had knowledge of facts from which he (it) ought to have known, or will be presumed to have known of them" (dangerous conditions). The trial court found as a fact that knowledge by Butterworth of the longitudinal split (and he had such knowledge) "would have put him on inquiry concerning its safety." He had such knowledge and was put on inquiry as to the safety of the tread; being put upon inquiry concerning its safety he had "reason to suspect" the existence of danger; he was required to "exercise reasonable diligence to satisfy himself of their non-existence" (dangerous conditions), not by reason of any primary duty upon defendant to hunt for concealed defects, but because, having knowledge of facts from which he ought to have known of danger it must exercise reasonable diligence to satisfy itself that there is no danger.

This court applied *one* element of the applicable Missouri law—knowledge of concealed defects—but refused to apply the other and here controlling element—knowledge of facts that put it on inquiry concerning the safety of the tread.

The law of notice as expressed in the *Meade* v. *Montrose case, supra,* is similarly stated in *Selzer* v. *Baker,* 54 N. Y. S. 2d 666, as follows:

> "Whatever is notice enough to excite attention and put a party on guard and call for inquiry, is notice of everything to which such inquiry might have led."
>
> "When person has sufficient information to lead him to fact, he is deemed conversant with it." *Dow* v. *Worley,* 256 Pac. 56.
>
> "Notice sufficient to put reasonable person on guard and call for inquiry constitutes notice of ev-

erything to which inquiry might have led." *Trosper* v. *McKee*, 4 Pac. 2d 755.

"Knowledge of facts or circumstances putting person of ordinary prudence upon inquiry is knowledge of such facts as reasonable inquiry would disclose." *Shell Petroleum Co.* v. *Corn*, 54 F. 2d 766.

"Notice of facts inciting prudent person to inquiry is notice of facts which reasonably diligent inquiry would develop." *In re Bresman*, 45 F. 2d 193.

Judge Otis did *not* find that Butterworth did not have "knowledge of facts from which he ought to have known, or will be presumed to have knowledge" of the "dangerous condition." The fact is that he found by Finding of Fact 13 (as under the undisputed evidence he was required to find) that Butterworth did have knowledge of "the longitudinal split in the fourth tread," and he specifically found as a fact that that knowledge "would have put him on inquiry concerning its safety." The fact that Butterworth did or did not actually know when he saw the split, how the front half of the tread was nailed or did not know that there was a movement of the tread up and down is wholly irrelevant to the duty that arose when he saw the split tread. Knowledge of that split put him on inquiry as to the safety of the tread and he was then required to exercise reasonable care to find out how the tread was supported and what, if any, danger existed by reason of the split.

The trial court having found as a fact that he was put on "inquiry concerning its safety" it was up to Butterworth and this defendant to either find out and remedy the danger or inform the tenant thereof, and negligently failing so to do, it became liable.

This court in deciding the "negligent repair" issue refused to follow and apply the law of Missouri as expressed in the last controlling decision of the Supreme

Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, decided after the former opinion of this court in *Home Owners Loan Corporation* v. *Huffman*, 124 F. 2d 864, and in *Vollrath* v. *Stevens*, 202 S. W. 283.

The sum and substance of this court's opinion on this issue is that since "the defective fourth tread of the stairway which caused plaintiff's injury had remained untouched by the landlord from the time of renting the premises to the time of injury" there can be no liability.

The undisputed evidence, much of it coming from defendant's Reconditioning Inspector Butterworth, was that the defendant made a thorough examination of the stairway, including treads and "all structural parts" (R. 73, 74, 75). Butterworth was asked by the court:

> "The Court: What was your purpose in examining the stairway?" and he answered:
> "A. I was to see whether it was in sound condition" (R. 73).

Of course, the defendant had to inspect the stairway before it could decide what repairs were needed. It did inspect the whole stairway but negligently (we urge) decided to fix only the board in the bottom landing.

This court holds that even though the defendant left unrepaired what should have been repaired, the defendant is not liable because it left the fourth tread "untouched," and that liability can only flow from "touching" or doing some work on or about the fourth tread. That conclusion or holding in the *Davis* v. *Cities Service Oil Co.* case is exactly what the Missouri Supreme Court in the *Bartlett* v. *Taylor* case held was not the law of Missouri; and caused the court to overrule the Davis case. The fact that in the Bartlett case the defendant did "touch" the instrumentality involved is of no ma-

terial consequence. The Supreme Court overruled the *principle* underlying the Davis case and underlying the former opinion of this court. The principle announced in the Bartlett case had long been the law of Missouri. It was nothing new.

In *Vollrath* v. *Stevens,* 202 S. W. 283, 286, often cited, the Court said:

> "However, when defendant took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not non-feasance."

That the defendant here decided to recondition the house throughout is undisputed. Its property manager and Reconditioning Supervisor, Mr. Hale, had looked over the house and decided it should be thoroughly done over, and Butterworth, the Reconditioning Inspector, then made a thorough inspection of the whole house, including this stairway, "to see whether it was in sound condition" (R. 73). So it is plain, to use the language of the Vollrath case, the defendant "took upon itself the burden to use ordinary care to repair the premises, including this stairway." So if in so doing it "failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe (such as a split tread in a stairway that was obvious) it was guilty of misfeasance, and not non-feasance" (Parentheses ours).

All of which means that the holding of this court that a landlord must "touch" a defective part before it is liable is contrary to the law of Missouri.

If this court's analysis and appraisal of the Bartlett case is correct, then it follows that the Missouri Supreme Court in that case did a futile and meaningless thing in overruling the Davis case; when it said that the doctrine "that the repairs must 'make the land more dangerous for use' * * * should not be adopted or applied" it was uttering a meaningless phrase. Surely the following language approved by the Supreme Court in the Bartlett case should control this court, to-wit:

> "There is a suggestion that to make the landlord liable, the negligent repairs must have aggravated the defect, so that what was wrong before became more dangerous than ever. We cannot yield assent to this restriction of the field of duty. The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right."

Surely the "touch" doctrine is not the law of Missouri. Under the holding of this court if it be admitted that Butterworth examined the stairway "to see whether it was in sound condition" (R. 73) and examined the fourth tread, saw the split, overhang, improper nailing, split corner of the horse, and knew all the facts about the tread shown in evidence, and decided to do nothing about the tread, then no liability could arise because he did not "touch" the tread or perform any repairs at all; or suppose Butterworth knew all aforesaid facts and told one of his carpenters to put a "chock" under the tread so it wouldn't tip and the carpenter did nothing about it, then under the opinion of this court no liability could arise under this issue, because "so far as the fourth tread was concerned, it was in exactly the same condition at the time of the accident as it was before * * *." If that is the law

what becomes of the doctrine of the Bartlett and Vollrath cases? Under what circumstances could a landlord who decides to recondition a house including a stairway and examines the stairway "to see whether it is in sound condition" possibly be liable for negligently leaving "what was wrong, still wrong"? If the answer to that question be that the landlord must be shown to have done some work about the tread, before he can be held liable, we ask: "Must it be shown that such work was *negligently* done?" that is, must it be proved that such negligence made the danger worse?

If that is the conclusion to which we are driven, then it follows that such conclusion is what the Supreme Court in the Bartlett and Vollrath cases has held is *not* the law of Missouri.

To make the matter very simple and plain, let us assume, then, that Butterworth seeing the said condition of the tread, drove another 8-penny nail in the tread which did not penetrate or go into the horse. Of course such ineffective nail did not increase the danger and such nailing could not be said to have "proximately" caused the injuries, as the danger would be exactly the same before he put the nail in as it was afterward.

If this court means by "touching," any work done on the tread that *increased* the danger, then the case is decided under the Davis theory, which has been overruled and never was the law of Missouri. If the work done did *not increase* the danger, then this court could invoke the doctrine of proximate cause, that is, what defendant did did not cause the injuries.

If it is said there was no proof that defendant "entered upon the performance" of repairing the fourth tread; and hence no liability, the answer is that the uncontradicted evidence is that Butterworth did examine all the treads

"to see whether it (the stairway) was in sound condition" (R. 73).

It is respectfully submitted that this court should grant a re-hearing herein.

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Attorneys for Appellant.

Certificate of Counsel.

The undersigned counsel for appellant hereby certify that this Petition for Rehearing is filed in good faith and believed to be meritorious.

PRICE WICKERSHAM,
CLAY C. ROGERS,
Attorneys for Appellant.

CONCLUSION.

The affirmance of defendant's judgment is based upon erroneous constructions of Missouri law, contrary to the controlling decisions of the Supreme Court of Missouri, and the Courts of Appeals, fortified by erroneous disregard by the Circuit Court of Appeals of the Findings of Fact 12 and 13 of the District Court upon substantial evidence, in violation of Rule 52 (a). In effect and result, the Circuit Court of Appeals has assumed the prerogative of the Supreme Court of Missouri to change the Missouri law, and the prerogative of the District Court to find and determine the facts upon substantial evidence. The petitioner respectfully prays that the writ of *certiorari* be granted, that the judgment of the Circuit Court of Appeals be reversed and that the case be ordered remanded to the District Court for the sole purpose of determining the amount of plaintiff's damages.

Respectfully submitted,

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INDEX

CITATIONS

667179—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 394

MAE HUFFMAN, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE HOME OWNER'S LOAN CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 81–87) is reported at 150 F. 2d 162. The memorandum opinion of the District Court (R. 21–26) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1945 (R. 87–88), and a petition for rehearing (R. 89–102) was denied on July 23, 1945 (R. 103). The petition for a writ of certiorari was filed September 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals correctly applied the law of Missouri in affirming the judgment of the District Court in favor of respondent, in the light of the decision of the Supreme Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, which intervened between a previous decision of the Circuit Court of Appeals in favor of respondent and the present decision in the same case.

STATEMENT

The petitioner, a citizen of Missouri, brought this action in the District Court for the Western District of Missouri against the respondent, a corporation wholly owned by the Government, to recover damages for personal injury alleged to have resulted from respondent's negligence. A judgment in favor of petitioner was reversed by the Circuit Court of Appeals for the Eighth Circuit in *Home Owners' Loan Corporation* v. *Huffman*, 124 F. 2d 684, and a writ of certiorari to review that decision was denied by this Court, 316 U. S. 681. A new trial was had in the District Court, resulting in a judgment in favor of respondent (R. 27–28) which was affirmed upon appeal (R. 88).

The facts which were developed at the second trial do not differ from those which appeared at the first trial (R. 22, 82, 87). Briefly, they are as follows.

Petitioner's injury resulted from a fall upon the basement stairway of premises leased by respondent

to petitioner's employer (R. 22, 56), caused by the tipping of the fourth tread from the top of the stairway. The tread was split longitudinally, as it had been since long before the lease transaction, and was defectively fastened to the "stringer" below (R. 27. Before petitioner's employer entered into possession of the premises, respondent made certain repairs, including repairs to a landing near the bottom of the same stairway. No repairs were made to any other part of the stairway. (R. 22, 70). Respondent did not construct the building in which the injury occurred, but acquired it through foreclosure (R. 22).

The Circuit Court of Appeals on both appeals purported to follow the law of Missouri to the effect that a landlord is not liable in tort for injuries to a tenant or the licensee of a tenant, resulting from defects in leased premises, unless he undertook to make repairs and the injury resulted from his failure to exercise ordinary care in making them (124 F. 2d at 686; R. 85). Upon the second appeal the court also declined to reverse the trial court's determination that respondent Home Owners' Loan Corporation was not chargeable with discovery and concealment of the defect in the stair tread which led to petitioner's injury (R. 87).

Between the decision of the Circuit Court of Appeals upon the first appeal and its decision upon the second appeal, the Supreme Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, overruled statements in the opinions in *Davis* v. *Cities Service Oil Co.* (Mo. App.), 131 S. W. 2d 865, and *Logsdon*

v. *Central Development Assn.*, 233 Mo. App. 499, 123 S. W. 2d 631, that a landlord is liable for injury resulting from repairs which he has undertaken only if the repairs made the premises more dangerous than they were before, concluding instead that the plaintiff's case is made out when it appears that the repairs left a dangerous condition resulting from negligence in making them (174 S. W. 2d at 849). *Davis* v. *Cities Service Oil Co.* and *Logsdon* v. *Central Development Assn.* were cited by the court below in its opinion upon the previous appeal. (124 F. 2d at 686, 687.)

ARGUMENT

No question has been raised as to whether the law of Missouri governs this case. The courts below have assumed that it does and have sought to apply it. No question of refusal to follow applicable state law is involved.

The questions presented by the petition (pp. 22–24) are substantially the same as those presented by the previous petition (No. 1110, October Term, 1941, pet. 17–19), except that the petitioner now challenges in addition the ruling of the court below (R. 85–87) declining to reverse the trial court's conclusion with respect to respondent's alleged concealment of the defect which led to petitioner's injury (see *supra*, p. 3). We think it is evident that the additional question (pet. 22–23) does not involve an important question of Federal law but relates solely to the appraisal of evidence contained in the record. Accordingly, unless the court's treat-

ment of the intervening Missouri Supreme Court decision, allegedly changing the applicable law of that State, raises an important question, there is no basis for a writ of certiorari to issue.

Both the District Court (R. 24–25) and the Circuit Court of Appeals (R. 83–84) concluded that *Bartlett* v. *Taylor*, *supra*, did not change the law of Missouri in a pertinent respect or render that law out of accord with the proposition relied upon by the Circuit Court of Appeals upon the first appeal, "that under the decisions in Missouri, a tort action can only be sustained against the defendant landlord who actually makes a repair and as a result of his negligence in so doing injury results" (R. 83; 124 F. 2d at 687). Petitioner's right of recovery has not been denied on either appeal for failure to show that the repairs made by respondent increased the hazard which caused petitioner's fall. The elimination from the law of Missouri of a doubtful proposition (cf. *Bartlett* v. *Taylor*, *supra*) that at no time has affected this case, which might have required a showing of increased danger if it had been applied, obviously does not now require a review of Missouri law by this Court.

The authorities which establish that the state law was correctly applied in the Circuit Court of Appeals are cited in the opinions of that court and are reviewed in the brief in opposition to the previous petition for certiorari (No. 1110, October Term, 1941, br. in opp. 7–9). No useful purpose would be served by

reviewing those authorities here. Their effect upon this case has not been changed by *Bartlett* v. *Taylor*.

This litigation has been long protracted. No question requiring review by this Court, and no significant new question whatever, is presented by the petition. We respectfully submit that the cause should now be terminated.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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HAROLD LEE,
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SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945